

IN THE COURT OF APPEAL OF SEYCHELLES

BERNARD SULLIVAN

APPELLANT

VS

1. THE ATTORNEY GENERAL

2. THE GOVERNEMENT OF SEYCHELLES

RESPONDENTS

SCA 25 of 2012

=====

Counsel: Mr A. Derjacques for the Appellant.
Mr G. Robert, State Counsel for the Respondents

Date of hearing: 4th August 2014

Date of judgment: 14th August 2014

JUDGMENT

TWOMEY, MATHILDA JA

[1]. This appeal raises the central issue of whether the offence of criminal defamation is consonant with the Constitution of the Republic of Seychelles. That issue is interlinked to whether the offence as framed in the Penal Code satisfies the requirements of a prescribed law “necessary in a democratic society” as provided for in the Constitution and whether the Court, without overstepping its powers and encroaching on the legislative will of the nation, can decide whether the law on criminal defamation should be abrogated.

The ‘unproven’ facts

[2]. The appeal arises from events in 2010 when a period of community and political unrest developed in the village of La Misère, Mahé. We rehearse as yet unproven facts as described by both parties in their written submissions and also from the formal charge sheet produced in the case. The events occurred as the result of the pollution of a river course by a building contractor, Ascon, engaged to construct the palatial residence of Sheikh Khalifabin Zayed Al Nahyan, the President of the United Arab Emirates and prince of Abu Dhabi. Over 350 households, unable to drink water from their taps due to the pollution, filed for compensation. Minister Joel Morgan, then of the Ministry of Home Affairs, Environment, Transport and Energy chaired a high level committee responsible for the negotiations for compensation for the affected residents. During the course of these events, the appellant, a property owner at La Misère, dissatisfied with the role played by the Minister in those negotiations caused a photograph of the Minister to be enlarged, a Hitler moustache pasted above his mouth and the word “Traitor” inserted at the bottom of the photograph. The photograph was displayed on the back windscreen of his vehicle as he travelled on the public road on 20th October 2010. He was arrested at 1338 hours and detained until 1433

hours the following day. He was charged on the 23rd December 2010 with the offence of criminal defamation and the trial set to commence on 26th September 2011 in the Magistrates Court. The trial did not proceed as the Appellant filed a petition before the Constitutional Court for a declaration that the offence of criminal defamation was unconstitutional.

The decision of the Constitutional Court

[3]. In its decision dated 31st July 2013, the Constitutional Court took the view that although Article 22 of the Charter of Fundamental Rights and Freedoms of the Constitution (the *Charter*) guarantees the right to freedom of expression, that right is not absolute and is subject to restrictions as may be prescribed by law and necessary in a democratic society for protecting the reputation, rights and freedoms or private lives of persons. It found that section 184 of the Penal Code providing for the offence of criminal defamation was within the restrictions to the fundamental rights accorded to citizens as provided for in article 22 (2) of the *Charter*. It also found that the provisions of sections 184-191 of the Penal Code were formulated with sufficient clarity and precision to enable citizens to regulate their conduct and foresee their acts. By limiting the reach of the offence with clear defences, no threat was posed to the fundamental right. Finally, it stated that it was aware of the broader consensus against laws that criminalise defamation but that the matter of repealing the criminal law on defamation was not within the purview of the court but rather one that had to be decided by the legislature.

The relevant constitutional and legal provisions.

[4]. It is essential at this stage to recite all the relevant constitutional and legal provisions *in extenso* for the sake of convenience:

[5]. Article 22 of the Constitution of the Republic of Seychelles provides:

“Freedom of expression

22. (1) *Every person has a right to freedom of expression and for the purpose of this article this right includes the freedom to hold opinions and to seek, receive and impart ideas and information without interference.*

(2) *The right under clause (1) may be subject to such restrictions as may be prescribed by a law and necessary in a democratic society-*

(a) *in the interest of defence, public safety, public order, public morality or public health;*

(b) *for protecting the reputation, rights and freedoms or private lives of persons;*

(c) *for preventing the disclosure of information received in confidence;*

(d) *for maintaining the authority and independence of the courts or the National Assembly;*

(e) *for regulating the technical administration, technical operation, or general efficiency of telephones, telegraphy, posts, wireless broadcasting, television, or*

other means of communication or regulating public exhibitions or public entertainment; or

(f) for the imposition of restrictions upon public officers.@

[6]. Sections 184-191 of the Penal Code of Seychelles 1952 provide:

“CHAPTER XVIII - Defamation

Definition of libel

184. Any person who by print, writing, painting, effigy, or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, is guilty of a misdemeanour termed “libel”.

Definition of defamatory matter

185. Defamatory matter is matter likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation. It is immaterial whether at the time of the publication of the defamatory matter the person concerning whom such matter is published is living or dead:

Provided that no prosecution for the publication of defamatory matter concerning a dead person shall be instituted without the consent of the Attorney General.

Publication

186. (1) A person publishes a libel if he causes the print, writing, painting, effigy or other means by which the defamatory matter is conveyed, to be so dealt with, either by exhibition, reading, recitation, description, delivery, or otherwise, as that the defamatory meaning thereof becomes known or is likely to become known to either the person defamed or any other person.

(2) It is not necessary for libel that the defamatory meaning should be directly or completely expressed; and it suffices if such meaning and its application to the person alleged to be defamed can be collected either from the alleged libel itself or from any extrinsic circumstances, or partly by the one and partly by the other means.

Unlawful publication

187. Any publication of defamatory matter concerning a person is within the meaning of this chapter, unless (a) the matter is true and it was for the public benefit that it should be published or (b) it is privileged on one of the grounds hereafter mentioned in this chapter.

Absolute privilege

188. (1) The publication of defamatory matter is absolutely privileged, and no person shall under any circumstances be liable to punishment under this Code in respect thereof, in any of the following cases, namely:-

- (a) *if the matter is published by the President, or by the Council of Ministries or the People Assembly, in any official document or proceeding; or*
- (b) *if the matter is published in the Council of Ministers or the People's Assembly by the President or by any member of such Council; or*
- (c) *if the matter is published by order of the Council of Ministers; or*
- (d) *if the matter is published concerning a person subject to Defence Force discipline for the time being and relates to his conduct as a person subject to such discipline, and is published by some person subject to such discipline, and is published by some person having authority over him in respect of such conduct, and to some person having authority over him in respect of such conduct; or*
- (e) *if the matter is published in the course of any judicial proceedings by a person taking part therein as a judge or magistrate or commissioner or pleader or assessor or witness or party thereto; or*
- (f) *if the matter published is in fact a fair report of anything said, done, or published in the Council of Ministers or the People's Assembly; or*
- (g) *if the person publishing the matter is legally bound to publish it.*

(2) Where a publication is absolutely privileged, it is immaterial for the purposes of this chapter whether the matter be true or false, and whether it be or be not known or believed to be false, and whether it be or be not published in good faith:

Provided that nothing in this section shall exempt a person from any liability to punishment under any other chapter of this Code or under any other Act or statute in force within Seychelles.

Conditional privilege

189. A publication of defamatory matter is privileged, on condition that it was published in good faith, if the relation between the parties by and to whom the publication is made is such that the person publishing the matter is under some legal, moral or social duty to publish it to the person to whom the publication is made or has a legitimate personal interest in so publishing it, provided that the publication does not exceed either in extent or matter what is reasonably sufficient for the occasion, and in any of the following cases, namely:-

- (a) *if the matter published is in fact a fair report of anything said, done, or shown in a civil or criminal inquiry or proceeding before any court:*

Provided that if the court prohibits the publication of anything said or shown before it, on the ground that it is seditious, immoral, or blasphemous, the publication thereof shall not be privileged; or

- (b) *if the matter published is a copy or reproduction, or in fact a fair abstract, of any matter which has been previously published, and the previous publication of which was or would have been privileged under section 188; or*

- (c) *if the matter is an expression of opinion in good faith as to the conduct of a person in a judicial, official, or other public capacity or as to his personal character so far as it appears in such conduct; or*
- (d) *if the matter is an expression of opinion in good faith as to the conduct of a person in relation to any public question or matter, or as to his personal character so far as it appears in such conduct; or*
- (e) *if the matter is an expression of opinion in good faith as to the conduct of any person as disclosed by evidence given in a public legal proceeding, whether civil or criminal, or as to the conduct of any person as a party, witness, or otherwise in any such proceeding, or as to the character of any person so far as it appears in any such conduct as in this paragraph mentioned; or*
- (f) *if the matter is an expression of opinion in good faith as to the merits of any book, writing, painting, speech, or other work, performance, or act published, or publicly done or made, or submitted by a person to the judgment of the public or as to the character of the person so far as it appears therein; or*
- (g) *if the matter is a censure passed by a person in good faith on the conduct of another person in any matter in respect of which he has authority, by contract or otherwise, over the other person, or on the character of the other person, so far as it appears in such conduct; or*
- (h) *if the matter is a complaint or accusation made by a person in good faith against another person in respect of his conduct in any matter, or in respect of his character so far as it appears in such conduct, to any person having authority, by contract or otherwise, over that person in respect of such conduct or matter, or having authority by law to inquire into or receive complaints respecting such conduct or matter; or*
- (i) *if the matter is published in good faith for the protection of the rights or interests of the person who publishes it, or of the person to whom it is published, or of some person in whom the person to whom it is published is interested.*

Good faith

190. A publication of defamatory matter shall not be deemed to have been made in good faith by a person, within the meaning of section 189, if it made to appear either-

- (a) *that the matter was untrue, and that he did not believe it to be true; or*
- (b) *that the matter was untrue, and that he published it without having taken reasonable care to ascertain whether it was true or false; or*
- (c) *that in publishing the matter, he acted with intent to injure the person defamed in a substantially greater degree or substantially otherwise than was reasonably necessary for the interest of the public or for the protection of the private right or interest of which he claims to be privileged.*

Presumptions as to good faith

191. If it is proved, on behalf of the accused person, that the defamatory matter was published under such circumstances that the publication would have been justified if made in good faith, the publication shall be presumed to have been made in good faith until the contrary is made to appear, either from the libel itself, or from the evidence given on behalf of the accused person, or from evidence given on the part of the prosecution.”

The appellant’s case

[7]. The appellant has put up five grounds of appeal against the decision of the Constitutional Court:

1. The Honourable Judges erred in law in failing to find and order that the Seychelles Penal Code, Cap 158, sections 184 to 199 are unconstitutional and breach article 22 of the Seychelles Constitution.
2. The Honourable Judges erred in law in failing to find and order that the proceedings in Criminal Side 852/2010 are unconstitutional and breach the petitioner’s rights as guaranteed under article 22 of the Seychelles Constitution.
3. The Honourable Judges erred in law in failing to find and order that the appellants arrest and detention by the Seychelles Police on the 30th October 2010 was unconstitutional and a breach of his rights.
4. The Honourable Judges erred in law in failing to order the respondents to pay compensation to the appellant in the amount of SR100, 000andwith costs.
- 5.The Honourable Judges erred in law in their opinion that the matter of repealing the criminal law on defamation is not within the purview of the court but rather a matter to be decided by the legislature of the country. The Honourable Judges could have determined that law in contravention of the Constitution can be set aside and voided by the Constitutional Court to the extent of the said contravention.

[8]. In summary, Mr. Derjacques for the appellant submits that the charge of criminal defamation laid against his client violates his fundamental right to freedom of expression as sections 184-191 of the Penal Code cannot be interpreted as restrictions or derogation as provided for under article 22(2) of the Constitution. He has submitted that the provisions of the Penal Code relating to criminal libel are undemocratic and disproportionately limit his fundamental right to freedom of expression. In support, he has produced a number of briefing papers on the chilling effect of defamation laws including the joint statement of the United Nations, the Parliamentary Assembly of the Organization for Security and Co-operation in Europe which states:

“Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”

[9]. Learned Counsel has also produced Briefing Paper No 10 of the American Civil Liberties Union and has quoted at length from it as regards the First Amendment Right which prohibits the making of laws abridging the freedom of speech in the United States. He has also submitted that given the fact that civil defamation laws as they exist in Seychelles could

provide sufficient deterrence in such circumstances, there is no necessity for criminal laws to also limit the fundamental right to freedom of expression. Further, he has submitted that the arrest of the appellant and the institution of the proceedings against him are unconstitutional and give rise to compensation. Finally, he submitted that the court has power to strike down the law relating to criminal libel.

The Respondents case

[10]. The respondents for their part have submitted that the said laws fall within the framework of the Constitution and the ambit of exceptions to the right to freedom of expression. Mr. Robert for the respondents conceded that there must be a balancing exercise performed in terms of protecting the right to reputation and dignity against the right to freedom of speech. In this respect, he submitted that whilst there is a clear right to freedom of expression, that right is not absolute and is subject to restrictions prescribed by law and “necessary in a democratic society” for protecting the reputation, rights and freedoms or private lives of persons. As far as criminal libel is concerned, he submitted that the offence is a justifiable part of the law of a democratic society. It meets all the criteria of constitutionality in that it satisfies all the tests as laid down in article 22(2) of the *Charter* namely that it is sufficiently prescribed by law, it is a necessary legal restriction as it addresses a pressing social need and it is a proportionate restriction to a fundamental right in the interests of a democratic society. In the circumstances, he urged the court to find the provisions of the Penal Code in relation to criminal defamation to be constitutional.

[11]. Learned Counsel has produced a number of authorities, including the Canadian case of Lucas 1 SCR 439 which held that criminal defamation is a necessary restriction of person’s freedom of expression in a democratic society. He has also relied on a number of other Canadian authorities which set out the tests for determining the constitutionality of legal provisions, namely Lucas (supra), The Attorney General of Quebec v Irwin Toy Limited and ors [1989] 1.R.C.S. Wigglesworth v the Queen [1987] 2. S.C.R. 541 and Edmonton Journal v the Attorney General [1989] 2 R.C. S.

[12]. In further support of his arguments, learned counsel, Mr. Robert has brought the attention of the court to philosophical and literary pronouncements on the subject of free speech, dignity and reputation. He has quoted Oliver Wender Holmes, Jr that “The most stringent protection of free speech would not protect a man in falsely shouting “fire” in a theatre” and “The right to swing my fist ends where the other man’s nose begins.” While on the subject of lofty quotes, Justice Fernando also put the following relevant quotation to counsel for their comment:

*“Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; ’tis something, nothing;
’twas mine, ’tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.”*

It is clear from the authorities and literary citations produced and the briefings from international organisations that freedom of expression is treasured as much as the innate dignity of all humans together with one’s reputation or good name. Lofty quotations apart, it befalls us to consider the law of criminal defamation and its relationship with the freedom of expression.

The law of criminal defamation.

[13]. In order to decide whether the offence of criminal defamation is unconstitutional we need to consider the elements of the offence. We have been unable to trace any previous prosecutions for criminal libel in Seychelles and take cognisance of the fact that the offence is based on the English common law offence of criminal libel which was abolished in that jurisdiction in 2010. In English law, defamation now generally refers to the undermining of someone's reputation. We have taken the liberty to explore the origins of the offence as we believe it may put into context the crime as it survives today in our own jurisdiction. Criminal defamation dates back to the 1275 Statute of Westminster, which established the offence of *scandalum magnatum* (slander of magnates). The law provided that

"... from henceforth none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm."

In other words, a measure "not so much to guard the reputation of the magnates, as to safeguard the peace of the kingdom", (viz William Searle Holdsworth, *A History of English Law vol III* (5th edn Methuen & Company Limited, 1942, 409). It must be remembered that this offence was introduced at a time when information was scarce and false rumours could easily lead to revolt and violence. *Scandalum magnatum*, it would seem, was inherited through the Star Chamber from Roman law from the crime of *lèse-majesté* (a verbal attack or insult to the king or emperor). However in Rome, *lèse majesté* did not necessarily refer solely to insulting a monarch. "*Majestas*" was defined by Ulpian, a Roman jurist, as "*crimen illud quod adversus Populum Romanum vel ad versus securitate me jus committitur*" – that is, a crime committed against the Roman people or against its security. It is clear that at its inception, public order was the rationale for criminal libel and that it was clearly an offence against those in power.

[14]. In parallel to criminal defamation, civil defamation developed during the 16th century in the common law courts as *an action on the case*, the purpose of which was to provide compensation for damage to the victim of the slander. As the offence became popular and a multiplicity of suits resulted, a number of rules were developed to restrict its application. Some of these developed into the modern day rules relating to publication and also to defences to the offence. On the abolition of the Star Chamber, both civil defamation and criminal defamation were administered by the same court, that is the Court of the King's Bench and the rules pertaining to both began to interact. In terms of criminal libel a distinction arose between libel against a political person and a private person, the former regarded as more serious (viz *De Libellis Famosis* (1606) 5 Co. Rep 125a). Political libel included the publication of words which were seditious or the utterance of words that would lead to a breach of the peace. (Holdsworth, supra). Since the enactment of the 1843 Libel Act criminal defamations were not prosecuted in England but remained on the statute books.

[15]. Nevertheless, a century later, the British Empire still found it necessary to impose the laws of criminal and seditious libel on Seychelles as it had done in most of its other colonies, dependencies and territories. It is obvious that the prime purpose for the offences was to protect the British Crown against dissidents in its colonies or to deter those keen to incite rebellion and treason. Despite the fact that criminal defamation was abolished in the UK in 2010, it has survived in Seychelles and seems to have developed into an offence aimed at

protecting the reputation of persons in their trade or profession or to protect someone from exposure to hatred, contempt or ridicule generally; in effect it has become a replica of its cousin, civil defamation, punishable not by damages but by imprisonment or fine or both.

[16]. Since the enactment of the 1993 Constitution, there is no doubt that offences such as criminal libel, seditious libel, scandalising the court and other allied offences need to be scrupulously examined in the light of the constitutional provision for the right to freedom of speech. Be that as it may, these offences have survived in this country presumably under permissible exceptions under the Constitution. It is the constitutional permissibility of these exceptions that is now in issue.

[17]. We can extrapolate the ingredients of the actus reus of the offence of criminal libel from the provisions of section 184 of the Penal Code as being: (i) a "publication" (ii) of "defamatory matter" (whose definition in sections 185 includes any matter likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule or likely to damage that person in his/her profession or trade) and (iii) that is unlawful (deemed by section 187 to be proven unless it is true, for the public benefit or privileged as set out in section 188-189). Insofar as the mens rea of the offence is concerned, the accused's state of mind in regard to four matters must be proven: (i) knowledge that the matter was defamatory (ii) knowledge that the matter was false (iii) intent to injure (over and above the necessity of the public interest) and (iv) the opinion of the accused person was not held in good faith.

[18]. Whilst the Penal Code does not state it explicitly, we regard it as read that the burden of proving the crime should rest entirely on the prosecution. In *George Worme and Grenada Today Limited v Commissioner of Police of Grenada* [2004] UKPC 8; [2004] 2 AC 430, on a case stated to the Privy Council on similar issues, the Law Lords were of the view that the *Woolmington* principle should apply (see *Woolmington v DPP* [1935] AC 462, 481). *Worme* is an important case and in our considered view has direct application to any prosecution for criminal defamation in Seychelles. The Privy Council stated:

"...the language of the relevant provisions of the Code is not designed to place the burden of proof of absolute privilege on the defendant..."

*One integral element of the actus reus of the crime under section 253 [our section 184] is that the defendant published the defamatory material "unlawfully". In section 256 [our section 187] the legislature has made any publication of defamatory matter unlawful unless it is privileged. This also means that any publication that is privileged is lawful. In other words, a person who publishes defamatory matter in any of the situations set out in section 257(1) [our sections 188-189] acts lawfully and commits no crime. This is obvious, for example, where a member of the House of Representatives publishes the matter in the house or where a judge publishes it in a judgment... but the same must apply to the other situations covered by subsection (1). Of course, unless the point is raised, the prosecution does not have to lead evidence to show that the matter was not published in such circumstances. But their Lordships readily conclude that, if the defendant raises such a defence and there is evidence to support it, then, in accordance with *Woolmington*, the prosecution must exclude that defence in order to prove that the defendant published the defamatory matter "unlawfully". There is in principle no reason to treat such a defence differently from self-defence, for example, which also exonerates the defendant and which the*

prosecution must exclude if the defendant raises it and there is evidence to support it. [Worme (supra) parags. 24- 25].

[19]. The Law Lords in *Worme* found support for their view in the Australian case of *Spautz v Williams* [1983] 2 NSWLR 506 in which Hunt J had stated:

“There is no reason why the ‘golden thread’ should not run throughout the law relating to criminal defamation just as it does throughout the web of English criminal law generally.” [Spautz (supra) 533].

[20]. We endorse this approach and find further support for this view in our constitutional provisions. Article 19(2)(a) of the *Charter* provides that every person who is charged with an offence is innocent until the person is proved or has pleaded guilty. In the circumstances, we find that every case of criminal defamation would have to be prosecuted within the strict confines we have outlined in terms of the ingredients of the offence to be proven by the prosecution so as to prevent inroads into the presumption of innocence staunchly defended by the *Charter*. Hence, for example, if the Attorney General was to exercise his prosecutorial discretion and choose to prosecute the appellant on the charge as contained in the charge sheet dated 17th December 2010, it would be incumbent on the prosecution to prove that the defamatory material was untrue and not published in good faith. The test in these circumstances is subjective as was emphasised by the Privy Council in the recent Mauritian case of *Dhooharika v The Director of Public Prosecutions* [2014] UKPC 11; [2014] WLR (D) 179 which concerned the offence of contempt by scandalising the court stated:

“...the question is whether the defendant was acting in good faith. If he was, he has a defence to the allegation of contempt by scandalising the court even if his criticism cannot be shown to be objectively fair. This view is supported by the authorities, many of which have stressed the necessity for a defendant who is convicted to have acted otherwise than in good faith... although good faith is sometimes described as a defence, the true position is that the burden is on the prosecution to prove absence of good faith.”(our underlining)

We adopt this position and find that in cases of criminal defamation, if the accused person claims he published defamatory material in good faith, it is incumbent on the prosecution to prove the absence of good faith.

[21]. The matter does not rest there. Our Penal Code provides further restrictions in terms of prosecutions for criminal defamation in the provisos to section 189. Of particular application to this case are the exceptions provided in paragraphs 189 (d) – (i) which indicate that where the defamatory matter is an expression of opinion in good faith, a matter of censure or a complaint, these are privileged and not punishable. In the case of *Lingens v Austria* (1986) 8 EHRR 407, the European Court of Human Rights drew a distinction between factual allegations and value judgments (opinions) and held that the latter could not be proven true or false, and thus a defendant in a criminal libel action could not be compelled to prove the truth of her/his opinions. Similarly in the case of *Jerusalem v. Austria*(2003) 37 EHRR25, the Court again held that the requirement to prove the truth of a value judgment is impossible to fulfil and infringes the freedom of opinion itself, which is a fundamental part of the right to freedom of expression. We note from the facts (as yet unproven) that the appellant was a person on behalf of whom the Minister was acting in

negotiations for compensation. That relationship would ultimately have to be taken into consideration as would the necessity of the prosecution to prove that the opinion expressed in the alleged defamatory material was not truly held by the appellant. Mr. Robert has conceded that the exception to the freedom of expression as contained in the provisions relating to criminal defamation is extremely narrow. In our view, as it exists, the offence of criminal defamation could only be used in the most flagrant, grave and deliberate cases of intentional injury to the reputation of another.

The constitutionality of the offence of criminal defamation.

[22]. Having identified the ingredients of the offence of criminal defamation, we now turn to the issue of whether the offence is constitutional. Three tests are applied to determine the constitutionality of legal provisions. Firstly, we have to determine whether the offence as framed is formulated with sufficient precision to satisfy a “prescribed law”. Secondly, whether the exception is necessary in a democratic society. Thirdly, whether there is proportionality between the offence in terms of the restrictions it imposes on a fundamental right of the *Charter* and the objective of the legislation identified.

The test of “prescribed by law”: the first test

[23]. The accepted requirements of a prescribed law are that it be certain, clear and precise and framed so that its legal implications are foreseeable. We have above outlined and analysed the ingredients which constitute the offence of criminal defamation. Mr. Derjacques for the appellant has very properly conceded that the offence as framed meets the first test. We need not therefore say any more on the matter.

The test of “necessary in a democratic society”: the second test

[24]. The different meanings of democracy was analysed in the course of argument by counsel. It was conceded that the concept of democracy is dynamic. In this respect we are guided both by national and international norms since article 48 of our Constitution directs us to take the following matters in consideration when interpreting the provisions relating to the *Charter*:

- “(a) the international instrument containing these obligations;*
- (b) the reports and expression of views of bodies administering or enforcing these instruments;*
- (c) the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms;*
- (d) the Constitutions of other democratic States or nations and decisions of the courts of the States or nations in respect of their Constitutions.”*

Article 45 also instructs us that

“This Chapter[on Fundamental Rights and Freedoms] shall not be interpreted so as to confer on any person or group the right to engage in any activity aimed at the suppression of a right or freedom contained in the Charter.”

Most importantly, article 49 defines “democratic society” as

“a pluralistic society in which there is tolerance, proper regard for the fundamental human rights and freedoms and the rule of law and where there is a balance of power among the Executive, Legislature and Judiciary.”

[25]. The offences of defamation, slander, insult, sedition and *lèse-majesté* laws that do not meet the international standards for legitimate limitations of the freedom of expression have therefore come under increasing attack and censure from international bodies including the United Nations Commission on Human Rights, yet the offences in its variants continue to exist in most European, Asian and African statute books. A few countries have abolished criminal defamation laws including England, Ireland, Croatia, Cyprus, Romania, Ghana, Bosnia-Herzegovina, Togo and Grenada. As pointed out by Mr. Derjacques for the appellant, it is becoming increasingly untenable in this day and age to reconcile the offence of defamatory libel with the concept of free speech. Over three decades ago, Lord Diplock expressed the same view in *Gleaves v Deakin* [1980] A.C. 477. In 2002, the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Co-operation in Europe Representative on Freedom of the Media and the Organisation of American States Special Rapporteur jointly declared that: “. . . all criminal defamation laws should be abolished and replaced where necessary with appropriate civil defamation laws.” Of particular concern is the fact that criminal libel has a chilling effect on the freedom of expression, resulting in self-censorship.

[26]. The European Court of Human Rights (ECtHR), however, has never directly ruled on the legality of criminal defamation laws or whether they violate the right to freedom of expression. At the same time, it has never upheld a prison sentence or other serious sanctions applied under such a law. In *Castells v Spain* (1992) 14 EHRR 445, it stated that a free press is one of the best means for the public to understand the ideas and attitudes of their political leaders and that it allows everyone to participate in the free political debate which is at the very core of a democratic society. In *Lingens* (supra), the Court outlined the demands of democratic society as being one accepting of pluralism, tolerance and broad mindedness. It acknowledged, however, that the press should not overstep the limits set for the “protection of the reputation of others”. It stated:

“More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.” (*Lingens*, supra) parag 4.

[27]. The ECtHR has acknowledged however that as far as public order is concerned, states should be free:

“to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.”(Castells, supra para 46)

This is interesting in the context of the origins of the offence of criminal libel as we have outlined above. The ECtHR seems to stress the role of criminal libel in guaranteeing public order which is quite a different prospect from protecting reputations. This would fit within the context of article 29 (2) of the Universal Declaration of Human Rights and article 9 of the European Convention on Human Rights that is, that the state should only intervene to limit human rights when these are in the interest of public order, health or morals, or for the protection of the rights and freedoms of others. The ECtHR has however in subsequent cases, notably *Chauvy and ors v France* (2005) 41 EHRR 29 recognised that there is a right to reputation that needs to be balanced against the right to freedom of expression.

[28.] In the United States of America during the civil liberties and Martin Luther King era, in the case of *New York Times Co. v. Sullivan* 376 U.S. 254 (1964) the Supreme Court gave unfettered protection to freedom of expression, including expression which might be vehement, caustic, and contain sharp attacks on government and public officials. The offence of criminal libel although still on the statute books is therefore generally not prosecuted in the States. Where it has existed in the rest of the world or is still extant, it is seen as part of the laws tolerated within the limitations to freedom of expression. Most of European and Commonwealth countries still have criminal defamation laws which they see as necessary limitations to the freedom of expression. As far as Seychelles is concerned we are not persuaded that the provisions of the law of defamation are any different. Whilst it may well be time for the legislature to abolish criminal defamation we regard this as policy decision based on international norms coupled with the realities of local considerations. The laws as currently framed may well fail to meet current recommendations of international bodies yet pass the second constitutionality test.

The test of proportionality: the third test

[29]. Of even greater responsibility is the fact that in criminal libel cases courts are asked to arbitrate between what can only be described as competing rights and to decide which right should give way to the other. In some cases a judicial search for a compromise may be possible but in most cases the Court will need to undertake the unenviable exercise of determining which right deserves preference over the other. Zimbabwe’s former Chief Justice Gubbay established the test for determining whether a limitation on freedom of expression is arbitrary, excessive or not permissible as the following:

“whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”(Nyambirai v National Social Security Authority [1996] 1 LRC 64, 75).

The ECtHR seems to put extra emphasis on the third limb of Gubbay’s test. It considers in each particular case whether the restrictions are proportionate to the legitimate aim pursued by the legislation. In this context it considers the impact of the restriction on the right itself. The application of the proportionality test has been followed in most jurisdictions.

[30]. In both *De Haes and Gijssels v Belgium* (1998) 25 EHRR1 and *Zugic v Croatia* (n. 36988/08, 31 May 2011) in cases of defamation against judges, the ECtHR found that the offence was not incompatible with the right to freedom of expression as the restrictions on free speech were proportionate. In *Worme* (*supra*) the Privy Council found that the hindrance to freedom of speech under s 10(1) of the Grenada Constitution constituted by the statutory crime of intentional libel was reasonably justifiable in a democratic society and noted that the offence was reasonably required to protect people's reputations and that it did not go further than was necessary to accomplish that objective. [Note however that Grenada has since abolished the crime]. In the South African case of *Hoho v The State* [2008] ZASCA 98, the Constitutional Court found that given the onerous burden of prosecuting criminal defamation cases: namely that of the state having to prove that the accused knew he was acting unlawfully or that his actions might be unlawful, was sufficient to constitute a reasonable and not too drastic a limitation on the right to freedom of expression. Similarly in *Dhoocharika* (*supra*), the Privy Council in its decision regarding the allied offence of scandalising the court followed its previous finding in *Ahnee v Director of Public Prosecution* [1998] 2 AC 294 that where an offence is narrow of scope it satisfies the constitutional criterion that it must be necessary in a democratic society.

[31]. By contrast, in *Madanhire and anor v Attorney General* (unreported) CCZ 2/2014, the Zimbabwean Constitutional Court, unanimously found that criminal defamation laws are disproportionate and not "necessary in a democratic society" and therefore unconstitutional. In that particular case the editor and journalist of *The Standard* were arrested for publishing an article in which it had alleged that the Green Card Medical Aid Society was unable to pay its members and staff as well as its creditors and that it was on the brink of collapse as its expenditure outstripped its income. Considering that the two accused persons would be investigated and face the danger of arrest and be subjected to the rigours and ordeal of a criminal trial, the court was of the view that "the traumatising gamut of arrest, detention, remand and trial" together with the cost of employing the services of a lawyer together with "the stifling or chilling effect of [criminal defamation's] very existence on the right to speak and the right to know" and the spectre of two years imprisonment, far outweighed the objective of offence which could not be said therefore to be reasonably justifiable in a democratic society. *Madanhire* contains the startling observation that:

"It is inconceivable that a newspaper could perform its investigative and informative functions without defaming one person or another"

This is clearly misguided and a clear distinction should have been made between critical comments and defamation. Defamation only arises where statements made are untrue. We are also not convinced by the arguments in *Mahandire* that civil defamation provides adequate compensatory redress for injury in all cases. It neither addresses the situations where the injury is extremely grave or where the injured party does not have the means to seek redress.

[32]. When we apply the proportionality test both in the sense as outlined in the ECtHR cases and in the *Nyambirai* (*supra*), it is our considered opinion that the offence of criminal defamation in Seychelles is so narrowly framed considering the elements that have to be proved and the defences that exist, that it accomplishes the legislative objective of the obligation without encroaching unnecessarily on the fundamental right to freedom of expression. We have already outlined above the extremely strict and narrow confines of the

offence and the ingredients that must be proved beyond reasonable doubt by the prosecution, including the proof of an opinion not honestly held in good faith by an accused person. It is clear that one can only be prosecuted for the offence in very limited circumstances. The third test is therefore passed.

Our decision

[33]. Since the legal provisions for criminal defamation passes all the tests of constitutionality, ground 1 of this appeal is dismissed. We hold that the laws when correctly construed and applied would not per se be unconstitutional and subject to the facts may well be limitations necessary in a democratic society. In the circumstances, as far as ground 5 is concerned, we see little necessity in deciding whether the court can arrogate itself powers equivalent to the legislature in terms of abrogating laws or deciding whether this field of constitutional ground should be tilled by the legislature alone.

[34]. Having decided that there might be circumstances when the offence of criminal libel could be constitutionally and legitimately prosecuted, we do not feel we can opine what these circumstances might be and reserve the right to do so when or if such cases present themselves to us. Equally, there might be cases, including the present prosecution that may well fall foul of the narrow constraints of the criminal defamation laws. However, the present case has not yet been tried; the facts as described by the appellant have not been tested or adjudicated on, a conviction has not been secured nor an appeal lodged. In the circumstances, we are of the view that it would be premature at this stage to rule that the proceedings in Criminal Side 852/2010 are unconstitutional and breach the petitioner's rights as guaranteed under article 22 of the *Charter*. The question of damages for breach of the appellant's constitutional rights therefore also does not yet arise. Grounds 2, 3 and 4 which are premised on the conviction of the appellant are therefore premature and cannot be decided unless and until the appellant is convicted of criminal libel, if ever.

[35]. In the circumstances this appeal is dismissed in its entirety. We do not however make any order as to costs and commend counsel for their assistance in this important constitutional matter.

.....
F. MACGREGOR PRESIDENT	S. DOMAH JUSTICE OF APPEAL	A. FERNANDO JUSTICE OF APPEAL
.....	
M. TWOMEY JUSTICE OF APPEAL	J. MSOFFE JUSTICE OF APPEAL	

Dated this 14th August 2014, Ile du Port, Mahé, Seychelles.